

**ARIZONA REPUBLICAN PARTY**

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Matt Salmon
Chairman

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MAY 24 2006

CITIZENS CLEAN ELECTIONS
COMMISSION

May 24, 2006

Todd F. Lang
Executive Director
Citizens Clean Elections Commission
1616 W. Adams, Suite 110
Phoenix, AZ 85007

Re: **CCEC MUR #06-0001**
*The Arizona Republican Party's Reply to the May 4, 2006 Letter of Attorney
Andrew S. Gordon, counsel to Candidate Janet Napolitano and the Janet
Napolitano 2006 Committee*

Dear Mr. Lang:

I serve as the Executive Director to the Arizona State Republican Party (AZGOP). In that capacity, and on behalf of the AZGOP, this letter serves as the AZGOP's reply in opposition to the May 4, 2006, verified letter response submitted to the Commission by attorney Andrew S. Gordon on behalf of his clients, candidate Janet Napolitano and the Janet Napolitano 2006 Committee (collectively referred to as "Ms. Napolitano"). Ms. Napolitano's response, as you are aware, addresses the Complaint filed with the Commission on April 24, 2006, by the AZGOP.

The AZGOP respectfully submits that a reasonable and objective application of Arizona election law to the currently known facts amply establishes that Ms. Napolitano violated the letter and spirit of the law. The only remaining question centers on the appropriate remedy for the violation, and whether the Commission is willing to apply Arizona election law equally to all people regardless of their position or power.

The AZGOP understands that the Commission's decision concerning the appropriate remedy to impose on any candidate for a violation is always a difficult burden for the Commission. It is difficult enough to decide on an equitable remedy to impose for an election violation when it is made by a private citizen or "average Joe" running for office, or even a sitting state legislator. It is also, no doubt, a far more difficult decision and burden when deciding on the remedy to impose on a powerful incumbent seeking reelection to the highest office in Arizona. This is, however, as it is so often said, a "nation of laws." No person is above

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the law. The AZGOP, therefore, respectfully urges the Commission to act fairly and responsibly on this matter without regard to consideration of rank or privilege.

Although the AZGOP believes that Ms. Napolitano has violated Arizona election law, the AZGOP understands that this is a question that the Commission must decide for itself. To help the Commission decide, the AZGOP wishes to raise several points about the response submitted by Ms. Napolitano and requests that the Commission consider the same.

THE CURRENTLY KNOWN UNDISPUTED FACTS

As an initial matter, it may be helpful for the Commission to understand what currently known facts are *not* disputed in this matter. These undisputed facts are as follows:

- Consultant IWS engaged in "discussions and planning done for launching the campaign *prior to* filing the [Ms. Napolitano] Statement of Organization." (Response at pg. 2)
- IWS designed and built a campaign website for Ms. Napolitano *before* the March 1, 2006 filing of Ms. Napolitano's Statement of Organization. (Response at pg. 2, and attached Letter of Agreement for Internet Consulting and Related Services)
- IWS assembled email addresses for Ms. Napolitano's campaign *before* the March 1, 2006 filing of Ms. Napolitano's Statement of Organization. (Response at pg. 6)
- Political committees must register *before* making expenditures. (Response at pg. 2)
- Ms. Napolitano "may not incur debt *before* receiving Commission funding." (Response at pg. 4, and attached Commission publication entitled "Campaign Expenditures").
- IWS designed and built website for Ms. Napolitano before her campaign was up and running on March 1, 2006, the day her Statement of Organization was filed.
- IWS assembled email addresses and used the same on March 1, 2006 in a "blast" email to numerous people. This was done for, and on behalf of, Ms. Napolitano's campaign.
- Ms. Napolitano filed her Statement of Organization "on the morning of March 1st." (Response at pg. 5)

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Based on the foregoing, the AZGOP submits that there is no question that a substantial and costly amount of high-value work was performed by IWS for Ms. Napolitano *before* she filed her Statement of Organization on March 1, 2006. As such, the question presented is whether Ms. Napolitano incurred a debt before the filing, and/or whether she made an "expenditure" before the filing.

THE VIOLATION OF ARIZONA ELECTION LAW.

Arizona statute 16-901(8) broadly defines the term "expenditure." More specifically, the term "expenditure" includes "any... contract, promise or agreement to make an expenditure resulting in an extension of credit...."

In reliance on a contract between her committee and IWS signed *after* the filing of her Statement of Organization, Ms. Napolitano claims she violated no law because "(1) there was no pre-filing promise obligating the campaign for payment and (2) this was a regularly recurring administrative expense." (Response at pg. 6). This statement is problematic for several reasons.

First, there are no affidavits, or Rule (80)(i), Ariz. R. Civ. P, declarations made under penalty of perjury, from IWS consultant Max Fose, campaign official Noah Kroloff, or any other person plainly stating to the effect that there was no promise, "understanding," or agreement that IWS would be compensated or hired in the future. As you are aware, a "contract, promise or agreement" can be made orally. Often mere "intimations" between parties about a "possible" course of action can lead to obligations that are found enforceable under the law. A contract, promise or agreement need not be in writing to be binding. Indeed, there is an entire body of contract law concerning the enforcement of "understandings" between parties that are never reduced to writing. (See, e.g., Promissory Estoppel RAJI (3d) at Contracts 28; Quantum Meruit RAJI (3d) at Contracts 24)

Second, it is difficult to believe that IWS/Fose rendered the stated services to Ms. Napolitano for free, and without any expectation, understanding, or intimation of receiving future payment or a contract. Perhaps he was providing free service, but it seems unlikely and defies common sense.

Third, the "conditions" in the admitted understanding between Ms. Napolitano and IWS are illusory. Ms. Napolitano's response states that "prior to filing the Statement of Organization, the vendor [IWS/Fose] *understood* that if Governor Napolitano choose not to run for reelection or the campaign decided not to use IWS' services, any preparatory or planning work done by IWS would be without compensation." The response, however, contains no evidence from IWS that this is a sworn fact. Moreover, the response contains no evidence that Ms. Napolitano ever seriously considered not running for reelection. This "condition," therefore, was, in fact, non-

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existent. The response also contains no evidence that Ms. Napolitano was considering any other potential vendors for the design and creation of a campaign website, or the preparation for a broadcast email strategy. This "condition," therefore, was also non-existent. Again, the "conditions" were illusory.

Fourth, even by her own admission, Ms. Napolitano concedes that IWS understood it would be paid if: (1) she ran for re-election, and (2) if she ended up using IWS' services. Common sense tells us that she made those decisions before filing her March 1, 2006 Statement of Organization and simultaneously authorizing the debut of her IWS designed website and launching of the "blast" emails. The AZGOP, therefore, submits that even under her own statement, Ms. Napolitano incurred a debt to IWS/Fosc before her organizational filing, and made an "expenditure" as defined by statute.

Fifth, regardless of whether the agreement with IWS/Fosc, whether oral and then later reduced to writing, was a "regularly recurring administrative expencsc," a debt was incurred before her organization was formed, and an "expenditure" took place (i.e., an extension of credit).

A reasonable application of the law to the facts show that Ms. Napolitano violated the law by incurring debt and making an expenditure before she formed her campaign committee.

THE CURRENTLY KNOWN FACTS WARRANT A FULL INVESTIGATION

If the Commission has any doubt that Ms. Napolitano violated the law, it is incumbent upon it to investigate the matter and independently determine the facts so it may make a fair and impartial decision on whether a violation occurred, and if so, what to do about it. The Clean Elections Act was passed, in part, because citizens believed that incumbents have "an unhealthy advantage over challengers" and the public lacks "confidence in the integrity of public officials." A.R.S. § 16-940(B) (2) and (5). Ms. Napolitano's actions are squarely within the orbit of deeds that the Clean Elections Act was designed, and passed by voters, to protect against.

An investigation is also important, if not essential, to determine whether Ms. Napolitano's violation was done with knowledge or "knowingly." This is important because a "knowing violation of section 16-941" triggers certain penalties. Also, a person who "knowingly violates section 16-941 is guilty of a class 1 misdemeanor."

The Commission has the broad authority to subpoena witnesses, subpoena documents, compel testimony, administer oaths and affirmative, and take evidence. A.R.S. § 16-956 (B). The Commission needs to exercise this authority to determine the truth. Again, the position and power of the person subject to a Complaint should not dictate whether an investigation takes place.

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THE REMEDIES AVAILABLE TO THE COMMISSION

The AZGOP submits that based on the currently known facts a violation occurred. The available remedies and sanctions for a violation are covered by statute.

A.R.S. § 16-942(C) provides the most serious penalty. As an initial matter, the incurring of a debt or the making of an expenditure by a "clean candidate" before the filing of her Statement of Organization is an undisputable violation of A.R.S. § 16-941. (*See* 16-941(A) (2), (3) and (5)). **Under A.R.S. § 16-942(C) the Commission has authority to disqualify Ms. Napolitano as a candidate for governor. This is the political "death penalty." However, this same section also provides for an alternative whereby the Commission has the authority to disqualify Ms. Napolitano from receiving public monies as a "clean candidate."**

A.R.S. § 16-942(A) provides another range of penalty. Under this section, the civil penalty for a violation such as made by Ms. Napolitano "shall be ten times the amount by which the expenditures...exceed the applicable limit." A.R.S. § 16-942(A). Pursuant to the express terms of A.R.S. § 16-942(A), and the information provided by Ms. Napolitano in her response, **the Commission has the authority to issue a civil sanction in the amount of \$275,000 (ten times the total amount of the Napolitano-IWS contract value). Similarly, if the Commission only considers the violation to involve the initial installment payment by Ms. Napolitano to IWS (\$3,055), then the penalty would be \$30,550.**

If a Commission investigation determines that there was a "knowing" violation of the law, then the Commission has an addition basis under the law **to deny funding to a candidate and/or require the return of the issued public money.** A.R.S. § 16-942(D).

THE CCEC HAS JURISDICTION OVER THE COMMITTEE

Ms. Napolitano argues that "[t]he Commission... does not have jurisdiction over [her] alleged violations of A.R.S. § 16-902.01 ." (pg. 2.) This argument lacks merit.

The Citizens Clean Election Act, Article 2, does not stand alone and independent from Article 1. The two articles are interrelated, and inter-dependent. For example, the definitions for key terms, words or phrases that are used throughout Articles 1 and 2 are found in A.R.S. § 16-901 (in Article 1). Section 16-961 (in Article 2) or R2-20-101 (dealing with Article 2) do not redefine words already defined by the Arizona Legislature in section 16-901, but instead add new words and definitions. Indeed, A.R.S. § 16-961(A) (in Article 2) expressly states that the term "expenditures" is defined in section 16-901 (a component of Article 1).

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Ms. Napolitano has filed as a "Clean Candidate," has accepted, or will accept, taxpayer money to run her campaign, and is bound by the Commission's decision on whether she violated any aspect of Arizona's election laws in regards to her "clean" campaign. The Commission bears the responsibility of determining whether all candidates are treated equally under the law, or whether some candidates are "more equal" than others.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn Hamer", with a large circular flourish at the end.

Glenn Hamer

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